SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-200

WEIDINGER CHEVROLET, INC.,
Petitioner,

vs.

UNIVERSAL C.I.T. CREDIT CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-369

WEIDINGER CHEVROLET, INC.,
Petitioner,

VS.

UNIVERSAL C.I.T. CREDIT CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner's Motion for Summary Judgment seeking to establish liability on its underlying cause of action an appropriate procedural method to raise the constitutionality of an alleged pre-judgment taking?

2. Did petitioner waive, or is it estopped from asserting, its right to raise the constitutionality of the pre-judgment taking?

3. Can the constitutionality of the pre-judgment taking be properly raised in petitioner's action for conversion

of the automobiles taken; is this action an appropriate vehicle for considering the constitutionality of the pre-judgment taking?

4. Is petitioner's action an appropriate case in which to decide the question of the retroactivity of the "Fuentes-Mitchell v. Grant" doctrine?

5. Did the Missouri Statutes, Rules of Civil Procedure, and case law procedures provide the petitioners with adequate due process safeguards?

6. Do the facts of the instant case reveal "a special situation demanding prompt action" as suggested in the "Fuentes-Mitchell v. Grant" doctrine?

7. Is the petitioner, who was not in de facto possession of the automobiles in question, a proper party to raise the constitutionality of the pre-judgment taking?

STATUTORY PROVISIONS INVOLVED

RSMo. Sec. 400.9-302 When filing is required to perfect security interest—security interests to which filing provisions of this article do not apply

(1) A financing statement must be filed to perfect all security interests except the following:

(a) a security interest in collateral in possession of the secured party under section 400.9-305;

(b) a security interest temporarily perfected in instruments or documents without delivery under sec-

tion 400.9-304 or in proceeds for a ten-day period under section 400.9-306;

(c) a purchase money security interest in farm equipment having a purchase price not in excess of two thousand five hundred dollars; but filing is required for a fixture under section 400.9-313 or for a motor vehicle required to be licensed;

(d) a purchase money security interest in consumer goods; but filing is required for a fixture under section 400.9-313 or for a motor vehicle required to be licensed;

(e) an assignment of accounts or contract rights which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts or contract rights of the assignor;

(f) a security interest of a collecting bank (section 400.4-208) or arising under the article on sales (see section 400.9-113) or covered in subsection (3) of this section.

(2) If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(3) The filing provisions of this article do not apply to a security interest in property subject to a statute

(a) of the United States which provides for a national registration or filing of all security interests in such property; or

(b) of this state which provides for central filing of security interests in such property, or in a motor vehicle which is not inventory held for sale for which a certificate of title is required under the statutes of this state if a notation of such a security interest can be indicated by a public official on a certificate or a duplicate thereof.

(4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official.

(5) The filing provisions of this article do not apply to a mortgage security interest in or to a mortgage of property of any description or any interest therein when such a mortgage shall have been or shall be made by a corporation which is a railroad or a public utility as defined in the public service commission law, section 386.020, RSMo, or by a corporation, domestic or foreign, organized for the purpose of constructing, acquiring, owning or operating a railroad or a public utility, as so defined, in whole or in part in this state, but such a mortgage shall be recorded and filed in accordance with the following requirements:

(a) Such a mortgage shall be recorded in the office of the county recorder of deeds of each county in this state in which any real estate described in such mortgage is situated; and

(b) Such mortgage shall be filed in the office of the secretary of state if such mortgage includes any rolling stock, movable equipment or machinery or any other personal property.

In lieu of recording or filing an original of any such mortgage or of any supplement or amendment thereto, a true copy thereof may be recorded or filed with an affidavit by the mortgagor or the mortgagee, or an agent of either, that it is a true copy. Any such mortgage shall be a lien on the real estate therein described from the respective dates of filing such mortgage for record with the recorders of deeds of the counties in which it is so filed and shall be a lien on the rolling stock, movable equipment and machinery and other personal property included therein from the date of the filing of such mortgage with the secretary of state. If any such mortgage, filed or recorded as provided herein, by its terms creates a lien upon any property which may be acquired by the mortgagor after such mortgage is made, it shall be a lien upon all the interest of the mortgagor therein from the date of its acquisition by the mortgagor. For each mortgage and for each supplement and amendment to such mortgage filed with the secretary of state pursuant to the provisions hereof, the secretary of state shall charge and collect a fee of one dollar, and the secretary of state shall indorse on each such mortgage, supplement or amendment the date and time of filing thereof in his office and appropriate legend to index the filing thereof. When any such mortgage is satisfied or canceled and evidence thereof shall have been filed in the office of the secretary of state, the secretary of state shall enter the date of satisfaction or cancellation thereof in an appropriate record in his office. The secretary of state shall furnish to the person filing any such mortgage, supplement or amendment thereto or any evidence of satisfaction or cancellation of any such mortgage a certificate of such filing. (L. 1963 p. 622 § 9-302)

MISSOURI SUPREME COURT RULES OF CIVIL PROCEDURE

Rule 99.01 When Possession of Personal Property is Claimed—What Proceedings Shall Be Had

If the plaintiff claim in his petition the possession of specific personal property, he may, at the time of filing his petition, or at any other time afterward, before the rendition of judgment in the cause, file his affidavit, or the affidavit of some other person in his behalf, showing: (1) that the plaintiff is the owner of the property claimed, sufficiently describing it, or is lawfully entitled to the possession thereof; (2) that it is wrongfully detained by the defendant; (3) the actual value thereof; (4) that the same has not been seized under any process, execution or attachment against the property of the plaintiff; and (5) that plaintiff will be in danger of losing his said property, unless it be taken out of the possession of the defendant, or otherwise secured.

Rule 99.02 Order of Delivery Shall be Made—When—By Whom

Upon filing such affidavit, the court or judge or clerk in vacation shall make an order requiring the defendant to deliver the property specified in the affidavit to the sheriff, and requiring the sheriff, if the same be not delivered to him, to take it from the defendant and deliver it to the plaintiff.

Rule 99.03 Before Property Taken, Plaintiff to Deliver Bond to Sheriff—Condition of Bond

The sheriff shall not receive or take such property until the plaintiff shall deliver to him a bond, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property stated in the affidavit, for the prosecution of the action with effect and without delay, for the return of the property to the defendant, if return thereof be adjudged, and, in default of such delivery, for the payment of the assessed value of such property, and for the payment of all damages for the taking and detention thereof, and for all costs which may accrue in the action.

Rule 99.04 Sheriff Shall Take and Deliver Property to Plaintiff—When

Upon such bond being executed as aforesaid, the sheriff shall receive the property, or, if the same be not delivered, shall take the property and deliver it to the plaintiff, unless, before such delivery to the plaintiff, the defendant shall, with two or more sufficient sureties, to be approved by the sheriff, execute a bond to the plaintiff, to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff, for the delivery of said property to the plaintiff, if such delivery be adjudged, and, in default of such delivery, for the payment of the assessed value of such property, and for the payment of all damages for injuries to the property, and for the taking and detention or detention thereof, and all costs which may accrue in the action.

Rule 85.01 Attachment, When Issued—Parties To—Causes For

In any court having competent jurisdiction, the plaintiff in any civil action may have an attachment against the property of the defendant, or that of any one or more of several defendants, in any one or more of the following cases:

(1) Where the defendant is not a resident of this state;

(2) Where the defendant is a corporation, whose chief office or place of business is out of this state;

(3) Where the defendant conceals himself, so that the ordinary process of law cannot be served upon him;

(4) Where the defendant has absconded or absented himself from his usual place of abode in this state, so that the ordinary process of law cannot be served upon him;

(5) Where the defendant is about to remove his property or effects out of this state, with the intent to defraud, hinder or delay his creditors;

(6) Where the defendant is about to remove out of this state, with the intent to change his domicile;

(7) Where the defendant has fraudulently conveyed or assigned his property or effects, so as to hinder or delay his creditors;

(8) Where the defendant has fraudulently concealed, removed or disposed of his property or effects, so as to hinder or delay his creditors;

(9) Where the defendant is about fraudulently to convey or assign his property or effects, so as to hinder or delay his creditors;

(10) Where the defendant is about fraudulently to conceal, remove or dispose of his property or effects, so as to hinder or delay his creditors;

(11) Where the cause of action accrued out of this state, and the defendant has absconded, or secretly removed his property or effects into this state;

(12) Where the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor, or for the seduction of any female;

(13) Where the debtor has failed to pay the price or value of any article or thing delivered, which by contract, he was bound to pay upon the delivery;

(14) Where the debt sued for was fraudulently contracted on the part of the debtor.

Rule 85.03 The Affidavit

An affidavit alleging any one of the causes set forth in the several paragraphs of Rule 85.01, in the language of such paragraphs, shall be held good and sufficient.

Rule 85.04 Attachments, How Obtained—Affidavits and Bond—Exceptions—May Be Issued and Served on Sundays

Any plaintiff wishing to sue by attachment may file in the clerk's office of the court in which the attachment is instituted, or with the magistrate before whom the suit

is brought, a petition or other lawful statement or exhibit of his cause of action, and, except in suits instituted by the state or a county in its own behalf, and except in cases where the defendant is not a resident of the State of Missouri, in either of which cases no bond shall be required shall also file an affidavit and bond, and, thereupon, such plaintiff may sue out an original attachment, if in the circuit court, against the lands, tenements, goods, moneys, effects and credits of the defendant in whosesoever hands the same may be; or, if before a magistrate, against the goods, moneys, effects and credits of the defendant, wheresoever found within the county; and where the affidavit for an attachment states that the plaintiff will lose his claim, unless the writ of attachment issues, and be served on Sunday or any other legal holiday, the writ may be issued and served on that day; provided that when any writ of attachment has issued against a nonresident and the plaintiff has given no bond, the attachment shall be dissolved as of course, and the lands, tenements, goods, moneys, effects and credits of the defendant taken or levied upon under such writ of attachment shall be released therefrom, upon the defendant entering his appearance and filing his answer to the merits of the case; unless the plaintiff shall, within ten days from the date of the filing and service of defendant's answer and entry of appearance, file his bond in said case in double the amount sworn to in the affidavit of the plaintiff; provided, however, upon good cause shown, the circuit judge may grant an additional ten days to file said bond; the bond herein provided for as to its effect and the obligation of the parties thereto shall be the same as if filed before the writ of attachment was issued.

Rule 85.05 Form of Affidavit, by Whom Made

The affidavit shall be made by the plaintiff, or some person for him, and shall state that the plaintiff has a just demand against the defendant, and that the amount which the affiant believes the plaintiff ought to recover, after allowing all just credits and set-offs, is ..... dollars, and that he has good reason to believe, and does believe, in the existence of one or more of the causes which according to the provisions of Rule 85.01 would entitle the plaintiff to sue by attachment.

Rule 85.06 Bond, By Whom Executed—Conditions

The bond shall be executed by the plaintiff, or some responsible person as principal, and one or more sureties, resident householders of the county in which the action is to be brought, in a sum at least double the amount sworn to in the affidavit, payable to the state of Missouri, conditioned that the plaintiff shall prosecute his action without delay and with effect, refund all sums of money that may be adjudged to be refunded to the defendant, or found to have been received by the plaintiff and not justly due to him, and pay all damages and costs that may accrue to any defendant, garnishee or interpleader by reason of the attachment, or any process or proceeding in the suit, or by reason of any judgment or process thereon, and pay all damages and costs that may accrue to any sheriff or other officer by reason of acting under the writ of attachment, following the instructions of the plaintiff.

Rule 85.07 Bond, By Whom Approved—Attachment Not to Issue Until

The clerk shall judge of the sufficiency of the penalty and the security in the bond; if they be approved, he shall endorse his approval thereon, and the same, together with the affidavit and petition or other lawful statement of the cause of action, shall be filed before an attachment shall be issued; provided, that in all cases where the clerk shall be a party to the suit, the sheriff shall pass on and determine the sufficiency of the bond.

Rule 85.39 Motion to Dissolve the Attachment

In all cases where property, effects or credits shall be attached, the defendant may file a motion to dissolve the attachment, verified by affidavit, putting in issue the truth of the facts alleged in the affidavit on which the attachment was sued out.

Rule 85.40 Proceedings on, Burden of Proof Judgment, Appeal, Effect of Appeal

The court shall hear evidence upon the issue joined by the motion to dissolve the attachment, and the burden shall be upon the plaintiff to prove the ground of attachment; and the court shall make an order either sustaining or overruling the motion to dissolve and, if the motion is overruled, the attachment shall remain in full force and effect unless the plaintiff shall voluntarily dismiss the same. Upon the trial of the case upon the merits, there shall be incorporated in the judgment rendered in the cause, as a part of such judgment, a finding and judgment either that the attachment be dissolved and the sureties thereon be released, or that the attachment be sustained, such finding to be in accordance with the action

of the court theretofore taken on the motion to dissolve the attachment. Either party may appeal from said judgment after timely filing of a motion for a new trial and adverse action thereon, and the giving of an appeal bond by the appellant in such amount as the court may require shall operate as a supersedeas of the judgment appealed from. If the bond is given by the plaintiff, it shall preserve the attachment in full force until the final determination of such appeal in the appellate court, or of the case upon a retrial in the trial court. If the plaintiff, in case the judgment or findings be against him, fails to appeal therefrom, or if such appeal be dismissed, or, if upon an appeal, such judgments or findings be affirmed, he and his sureties shall be liable on their bond for all damages and costs occasioned by the attachment or any subsequent proceedings connected therewith; provided that such appeal shall be taken and perfected as in ordinary civil actions.

ADDITIONAL STATEMENTS OF FACT

Petitioners brought an action against respondent in trover for conversion of twenty-two (22) automobiles in which it sought damages from the respondent for the value of said automobiles in the amount of $34,145.00, together with interest and costs.

Petitioner alleged that on or about December 11, 1969, the respondent converted to its own use twenty-two (22) automobiles being the property of the petitioner and being described in said complaint; this suit was filed on February 26, 1970. (Tr. 2, 4). Respondent's answer denied these allegations and affirmatively pleaded that its right to possession of the automobiles was superior to that of the petitioner; in its counterclaim respondent asserted that

the petitioner had received certificates of title to the automobiles described in its complaint from one Jimmy M. Swanson for the purpose of defrauding the defendant and hindering and delaying its collection of indebtedness in the amount of $72,500.00 owed by Swanson to respondent and sought damages allegedly caused it by result of such fraud (Tr. 6, 7). By pre-trial order No. 2 (Tr. 10) it was admitted by the parties as follows: That from September 15, 1964, until the time of the filing of this suit that GMCO Agency Inc. (an automobile dealer financing company) had floor planned financed used cars for one Jimmy Swanson, d/b/a Swanson Chrysler Plymouth; that said floor planning was pursuant to a floor plan agreement between those parties, said agreement being Exhibit 1 to Pre-Trial Order No. 2 (Tr. 10); that it was the general practice of GMCO to retain in its possession the title to each motor vehicle floor planned by it, but that it did not file or record a financing statement or other evidence of security interest with the recorder of any county or with the Secretary of State in connection with its used car floor plan agreement with Swanson; in the month of March, 1968, J. W. Carmichael, who was district manager of the Jefferson City office of C.I.T., procured the execution by Swanson of an "Agreement for Wholesale Financing" by which C.I.T. financed new cars for Swanson (Defendant's Exhibit 1, Tr. p. 19); C.I.T. knew at this time that Swanson had entered into a used car floor plan agreement with GMCO and C.I.T. did not intend to floor plan used cars for Swanson; C.I.T. filed a U.C.C. Financing Statement (Defendant's Exhibit 2, Tr. p. 22) with the Secretary of State of the State of Missouri and with the Recorder of Deeds of Maries and Phelps Counties; C.I.T. did not at any time prior to December 6, 1969, the date of petitioner's suit, floor plan any used cars for Swanson; C.I.T. consented to the sale of used motor vehicles by

Swanson in the normal course of business to a bona fide purchaser; petitioner was a corporation with all outstanding shares of stock held by Leonard Weidinger and his wife, Lucille, and during the time that GMCO had been floor planning used cars for Swanson, Leonard and Lucille Weidinger were the owners of one-third of the issued and outstanding shares of GMCO, Leonard Weidinger being vice president and treasurer of GMCO and also president of the petitioner corporation. Customarily upon default by Swanson in his used car floor plan with GMCO, and on other occasions, petitioner paid off the indebtedness to GMCO and thereby acquired titles to the motor vehicles which secured such indebtedness. Through the dates of December 6, 1969, and December 16, 1969, C.I.T. took possession of twenty-two motor vehicles (described in the amended complaint) under Writs of Replevin and Attachment against the property and effects of Swanson, petitioner not being made a party to either the replevin or the attachment suits; prior to December 6, 1969, GMCO had floor planned for Swanson fourteen of the twenty-two motor vehicles described in the Amended Complaint and at the time C.I.T. took possession of the twenty-two motor vehicles, certificates of title to fourteen of them had been assigned to petitioner; petitioner had placed all of the motor vehicles on used car lots of Swanson for sale on commission basis by Swanson with the proceeds going to petitioner, or for sale by petitioner itself without a commission. No notice of petitioner's ownership of the twenty-two motor vehicles alleged in the complaint was posted on or appended to the motor vehicles or posted on the premises where they were located at the time respondent took possession; between the dates of December 6, 1969, and December 16, 1969, respondent without consent or authorization from petitioner, took possession of the twenty-two motor vehicles described in the Amended Complaint.

The trial court found that immediately prior to instituting the suits against Swanson, respondent had discovered that Swanson had sold out of trust about $52,000.00 worth of new Chryslers and Plymouths (Tr. 29, 201).

Mr. James Dyer, who was a branch manager for respondent at the time the suit against Swanson was filed, testified that on the date the replevin suit against Swanson was filed he accompanied the sheriff to Belle, Missouri. Swanson was found in downtown Belle and the Sheriff served him with the replevin papers at that place and agreed to meet Dyer and the Sheriff at his dealership. Swanson did not show up, and when the Sheriff and Dyer arrived at the dealership Swanson's employees were driving away the used cars (Tr. 144). A few days prior to filing the replevin and attachment suits, Dyer prepared a list of cars to be replevined by a physical inspection of the cars on the lot; while there Dyer saw a stack of titles in the dealership which Swanson's employees told him were the titles to the cars, but Swanson had instructed his employees not to let Dyer see them; Swanson's sales manager and bookkeeper told Dyer that all the cars on the lot at Belle belonged to Swanson (Tr. 138, 139, 140, 141).

Perry Clark, a C.I.T. employee in 1969, testified that he made inspection trips to Swanson's various used car lots at Belle, Rolla, and Chamois, and during those trips he would make observation with reference to Swanson's used cars, although he did not make a car by car inventory thereof. During the course of these trips Clark had occasion to meet with Leonard Weidinger, as an officer of GMCO, to discuss the status of Swanson's accounts. Weidinger never mentioned that he owned some of the cars on Swanson's lots, never mentioned that GMCO was having any problem with Swanson on his notes, and never

mentioned that petitioner was paying off or assuming some of the Swanson notes as they became due (Tr. 147, 148). The first that Clark knew that Weidinger was claiming any interest in the cars in question was on the date that the replevin suits were filed against Swanson; on that date he had been in Rolla at Swanson's used car lot for several hours when one of Swanson's salesmen came from the dealership and said "we are now working for Mr. Weidinger, Mr. Swanson has signed all the titles to him".

None of respondent's employees who were called to testify, and none of Swanson's employees who testified, had any knowledge (prior to the filing of the replevin and attachment suits) that petitioner owned or claimed any interest in any of the used cars on Swanson's car lots (Tr. 177, 197, 214, 274).

The Missouri Department of Motor Vehicle Registration in Jefferson City, Missouri, was not informed of any of the assignments or purported sales from Swanson to Weidinger, by application for title, prior to the filing of the suits by respondent against Swanson (Plaintiff's Exhibit 4, Tr. 221-240, Defendant's Exhibits 6, 7, 8, 9, 10, 11, Tr. 271, 280, 289, 298, 306, 314).

Jimmy Swanson, on his dealer's monthly sales reports submitted to the Missouri Department of Revenue, Division of Collection, Motor Vehicle Unit, in which he was to report the sale of all new and used motor vehicles, failed to report any of the sales or assignments of the motor vehicles in question to Weidinger Chevrolet (Defendant's Exhibit 4, Tr. 249-268). Titles to the automobiles in question were assigned by petitioner to respondent in April of 1970, so that the automobiles could be sold by respondent in order to mitigate the damages and to prevent further depreciation (Tr. 67, 81, 195). By agreement of

the parties, the trial of the liability issue was had to the court without a jury on July 7 and July 8, 1971 (Tr. 3) and trial of the balance of the issues was had before the court without a jury on May 24, 1973 (Tr. 3). Between the two trial dates, on December 18, 1972, petitioner filed a Motion for Summary Judgment in which it prayed for "a summary judgment in its favor on the issue of liability . . ." (Tr. 3, 24). After the close of the evidence on May 24, the Court took the case under advisement and on June 27, 1973, the court filed an opinion and judgment awarding the petitioner $41,490.00 (including interest) against the respondent and taxing the costs to the respondent (Tr. 3, 27).

Due to the fact that petitioner was not a party to the original replevin and attachment suits, that the Motion for Summary Judgment filed in December of 1972 first raised the issue of lack of due process of law due to pre-judgment taking, and that there was no evidentiary hearing on this motion, the evidence as to the facts and circumstances surrounding the original suits and the original taking are not in the transcript or record of this case.

REASONS FOR DENYING THE WRIT

I. The opinion of the United States Court of Appeals for the Eighth Circuit, in holding that petitioner's raising of the constitutional questions under the Fourteenth Amendment came too late, does not present novel and serious constitutional questions, and is not in conflict with applicable provisions of the Supreme Court of the United States.

II. The decision of the Court of Appeals for the Eighth Circuit is not in conflict with the decision of another court of appeals on the same matter.

III. The decision of the Court of Appeals holding that the instant case was not an appropriate vehicle to challenge the constitutionality of the Missouri replevin statutes has not decided an important state question in conflict with applicable state law.

IV. The instant case, involving an action for trover and conversion in commercial transactions, is not an appropriate vehicle for deciding the retroactivity of the "Fuentes" doctrine as modified by *Mitchell* v. *Grant*.

ARGUMENT

I. The Opinion of the United States Court of Appeals for the Eighth Circuit, in Holding That Petitioner's Raising of the Constitutional Questions under the Fourteenth Amendment Came Too Late, Does Not Present Novel and Serious Constitutional Questions, and Is Not in Conflict with Applicable Provisions of the Supreme Court of the United States.

The opinion of the United States Court of Appeals for the Eighth Circuit in the instant case does not attempt to pass upon either the constitutionality of the Missouri replevin and attachment statutes or upon the taking of the automobiles in this case; it merely noted that on state of the record in this case it would be inappropriate to pass upon the constitutionality of these Missouri statutes. Respondent submits that this is precisely correct, for several reasons. First, the constitutional issue is here not being raised by a defendant whose actual possession of the property in question had been terminated by the replevin taking; it should be remembered that the original taking in the instant case arose out of a replevin case filed by the respondent against Jimmy Swanson, d/b/a

Swanson Chrysler-Plymouth. Petitioner had voluntarily relinquished its de facto possession of the automobiles by allowing them to remain on Swanson's used car lots for sale on a commission basis by him; petitioner's actual or de facto possession of the automobiles was therefore not terminated by the action against Swanson, but Swanson's possession thereof was terminated. Swanson is not a party to this litigation and has not raised the issue. Obviously, petitioner was not interested in the possession and use of these automobiles as automobiles per se; its interest in them was for sale purposes as part of its stock in trade and in obtaining the monetary value thereof. No doubt that is why petitioner instituted this suit as trover and conversion, in which it sought to obtain judgment for the value of the automobiles, rather than attempting to regain the actual possession of them. To this extent the instant case differs markedly from the other cases decided by this court for in them articles of property used in day to day living were involved. By this, we do not attempt to become involved in the argument as to applying different standards of due process to "the necessities of life" as opposed to property that are not necessities; we merely note that in each of the other cases the person whose possession was terminated was interested in the actual possession and use of the property in question, but that that is not the situation in the case at bar. Thus in *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1963, the articles involved were a gas stove, a stereo phonograph, a bed, a table, and other household goods; a refrigerator, range, stereo and washing machine were the articles involved in the case of *Mitchell* v. *W. T. Grant Co.*, ... U.S. ....., 40 L.Ed.2d 406, 94 S.Ct. .....; *McClellan* v. *Commercial Credit*, 350 F.Supp. 1013 (D.R.I. 1972), affirmed sub nom., *Georges* v. *McClellan*,

409 U.S. 1120 (1973), 93 S.Ct. 935, 35 L.Ed.2d 253, involved a family automobile, as did its companion case.

Secondly, the record in the instant case is almost devoid of the circumstances surrounding the taking of the automobiles in question, the pleadings involved, and neither does it show the affidavits and bonds in attachment and replevin filed by the respondent. The reason for this lack of evidence is both simple and obvious; petitioner was not a party to the original replevin and attachment suits, and when he did bring suit he did not seek to raise the issue of the alleged unconstitutionality of the taking. He sought to recover the value of the cars as of the date of the taking. During the pendency of this litigation the petitioner, at the request of the respondent and by way of a gentlemen's agreement, consented to the sale of the automobiles in question, in order to mitigate damages and prevent their further depreciation, and it furnished the respondent proper titles in order to effectuate such sale. The sale was accomplished during the spring and summer of 1970 and thereafter, on July 7 and 8, 1971, a trial of the liability issues involved in the trover and conversion case was held. It was not until almost a year and one-half after the trial of the liability issues that the constitutionality of the original taking was raised by petitioner, in its Motion for Summary Judgment filed on December 18, 1972. No evidentiary hearing was held on this motion, but it was argued immediately prior to the trial of the damage issue of the instant litigation, which was held on May 24, 1973. The trial court refused to grant the Motion for Summary Judgment and proceeded with the hearing of the damage issue. Therefore, none of the pertinent and relative facts surrounding the actual original taking ever became material and relevant to the issues in this litigation, as it was tried; this no doubt

gave rise to the Court of Appeals comment that it was inappropriate for them upon the record in this case to pass upon the constitutionality of the Missouri statutes.

Thirdly, it is entirely speculative and conjectural as to whether a notice to the defendant Swanson in the cases against him, with an opportunity for hearing prior to taking possession of the automobiles, would have been meaningful in this case. There was no formal or legal relationship between Swanson and petitioner; notice to Swanson would not have been notice to petitioner. Respondent, by searching the Motor Vehicle Registration records of the State of Missouri and by searching the U.C.C. filing records in the Secretary of State's Office of the State of Missouri would not have discovered any claimed interest by petitioner in the automobiles in question; this is for the reason that petitioner made no such U.C.C. filings and had not applied for title in its own name until long after this suit was instituted. Respondent had no prior knowledge of any claimed interest in the automobiles by petitioner, and even if respondent had followed a notice and pretermination hearing statute it would not have protected petitioner's claimed interest. When petitioner voluntarily placed its automobiles on Swanson's used car lots for sale, he assumed and took the risk of subjecting them to claims of Swanson's creditors; he could have minimized or prevented this risk by following the appropriate Uniform Commercial Code filing provisions (RSMo. 1969, Section 400.236 (3)) but did not choose to do so.

Summarizing this point, the instant case simply did not arise and was not in a proper posture for ruling on the issues of the constitutionality of the taking; the record necessarily made due to the procedural and substantive aspects of the case did not present the necessary facts for ruling, it did not involve the proper parties,

and the constitutional question was not timely presented. It was raised long after the trial of the underlying liability issues on the merits and after the property in question had long since been disposed of with the acquiescence and consent of the petitioner. As the Court of Appeals stated "Fuentes is here raised as a shield, rather than as a sword, and the defense comes too late".

II. The Decision of the Court of Appeals for the Eighth Circuit Is Not in Conflict with the Decision of Another Court of Appeals on the Same Matter.

Petitioner claims that the decision of the Court of Appeals in this case is in conflict with that of the Third Circuit in *In re Manufacturers Credit Corporation*, 441 F.2d 1313 (1971). That is simply not the case. Petitioner claims that the Missouri Motor Vehicle Registration Statute, RSMo., Section 301.210(1) prevails over the Uniform Commercial Code filing requirements, RSMo., Section 400.9-302. The Missouri Motor Vehicle Registration laws and the Missouri Uniform Commercial Code filing requirements have been carefully drafted to dovetail and work together. RSMo., Section 301.650 provides that the Motor Vehicle Registration provision for perfecting liens and encumbrances on motor vehicles do not apply to or affect . . . "(3) a lien or encumbrance on a motor vehicle or trailer created by a manufacturer or dealer who holds the motor vehicle or trailer for sale." Similarly the filing requirements of the Uniform Commercial Code, RSMo. Section 400.9-302 (3) provides that "the filing provisions of this article do not apply to a security interest in property subject to a statute . . . (b) . . . or in a motor vehicle *which is not* inventory held for sale. . .". The automobiles in question in this case were inventory held for sale, so the U.C.C. filing requirements do apply, and

they do involve a security interest in motor vehicles created by an automobile dealer, Swanson. Therefore the automobiles in question fall in the exception set forth in the Motor Vehicle Registration laws. *In re Manufacturers Credit Corp.*, supra, the Third Circuit case relied upon by petitioners, did not involve motor vehicles held for sale as part of the dealer's inventory, and did not involve a lien or security interest created by a dealer or manufacturer. There, the motor vehicles in question were a number of buses owned by a corporation which was engaged in the business of owning and leasing buses to operating companies. The lien was created by this owner, and in that situation the Third Circuit Court of Appeals quite properly held that the Motor Vehicle Registration and Encumbrances Laws applied rather than the Uniform Commercial Code filing laws; Washington was not a dealer or manufacturer of the buses, and was not holding them as inventory for sale, but was using them in their business. The instant case and the Third Circuit case involved different situations with different types of debtors and the two decisions are in no way in conflict.

III. The Decision of the Court of Appeals Holding That the Instant Case Was Not an Appropriate Vehicle to Challenge the Constitutionality of the Missouri Replevin Statutes Has Not Decided an Important State Question in Conflict with Applicable State Law.

Petitioner claims that the case at bar is in conflict with the case decided by the Supreme Court of the State of Missouri, en banc, in 1973, *State ex rel. Williams* v. *Berrey*, 492 S.W.2d 731. Petitioner is mistaken. The Missouri Supreme Court pointedly found ". . . the Court does not, by this decision, hold the pre-judgment possession provisions of the Missouri replevin statutes to be facially

unconstitutional." The Court of Appeals in the case at bar merely stated that this case was not an appropriate vehicle on which to challenge the constitutionality of the Missouri replevin statutes and, therefore, declined to pass on it. The cases are not in conflict. We have already pointed out at some length, under Point I, wherein our case differs markedly from the United States Supreme Court cases enunciating the pre-termination hearing doctrine. The Court of Appeals clearly differentiates the *Berrey* case from this one. There, plaintiff brought a mandamus action (incorrectly denominated a prohibition action) seeking restoration of possession of personal property consisting of a stove, refrigerator, beds, mattresses, springs and a bedroom set. In *Berrey* the mandamus proceeding was brought in Circuit Court to compel the Magistrate Court which had issued the Writ of Replevin to quash the summons and return and the Writ of Replevin and to dismiss the action; the defendant promptly raised the question of the constitutionality of the replevin statute, both in Magistrate Court and in Circuit Court. The Missouri case, then, involved a direct attack on the pre-judgment taking and sought relief in the form of restoring possession. Almost all the cases that have arisen have been in somewhat similar manner; they either have been brought under the Federal Civil Rights Act, 42 U.S.C., Sec. 1983, or have been injunction or mandamus proceedings or motions to dissolve the alleged unconstitutional pre-judgment taking. In the recent case of *Mitchell* v. *W. T. Grant Co.*, supra, the case arose out of a hearing on a motion to dissolve an alleged unconstitutional sequestration of the defendant's property. It should be carefully noted that all of the cases involve only an attack on the taking itself, and do not attempt to adjudicate the underlying issue of the main cause of action. However, this is precisely what the petitioner attempted to do in its

Motion for Summary Judgment in the case at bar (incidentally, filed three years after the original replevin and attachment suits had been instituted and some seventeen months after the trial of the liability issue had already been held). Petitioner, in its Motion for Summary Judgment, asked for a judgment "in its favor on the issue of liability", because of the unconstitutional taking. This attack, then, went to the underlying cause of action itself, and did not seek a reversal of the preliminary taking of the automobile and, in fact, did not seek damages for the alleged unconstitutional taking; petitioner's theory would appear to be that because of the alleged unconstitutional pre-judgment taking of the automobiles (from a different party) it is entitled to a judgment on the underlying cause of action without affording respondent a trial of such cause of action, and, incongruously, not seeking repossession of the automobiles in question or even damages for their alleged unconstitutional taking. It was for these reasons that the Court of Appeals correctly held that this case did not afford the appropriate vehicle for determining the constitutionality of the Missouri replevin and attachment statutes.

IV. The Instant Case, Involving an Action for Trover and Conversion in Commercial Transactions, Is Not an Appropriate Vehicle for Deciding the Retroactivity of the "Fuentes" Doctrine As Modified by Mitchell v. Grant.

For the many reasons argued in Points I and III of this brief, respondent contends that the constitutional due process requirement of a pre-termination hearing, or as modified by the case of *Mitchell* v. *Grant*, supra, does not apply, and cannot apply, to this case in its present posture. An additional reason for denying petitioner's writ

is that this case would directly call into question the retroactivity of the *Fuentes* doctrine. The trover and conversion action is not an apt, appropriate or proper type of proceeding in which to decide the retrospective application question. Already a federal court, in *Higley Hill, Inc.* v. *Knight,* 360 F.Supp. 203 (D.Mass. 1973) has held that under the factual situation presented in that case that *Fuentes* should not be given a retroactive application, except to the extent that where property remains attached the defendant should be given a fully adequate hearing upon request. We have previously pointed out that petitioner's suit was initiated in February, 1970 and that trial of the liability issue was had in July of 1971; the *Fuentes* case was handed down in June of 1972, and thereafter, in December of 1972 the constitutionality of the taking in this case was first raised by petitioner. A trover and conversion case is particularly inappropriate as a vehicle for deciding the important question of retroactivity; in trover and conversion the plaintiff seeks to recover the value of the articles converted as of the time of taking; if a plaintiff is successful on this theory and recovers such value as of the time of taking, together with interest, it would appear to preclude the question of damages for the alleged unconstitutionality of the taking (except for possible punitive damages) and obviously involves the choice to seek the value of the property rather than to enjcin or restrain the alleged unconstitutional taking and restore possession pending a hearing on the merits. Granting of certiorari in this case, and deciding one way or the other as to the retroactive application of the *Fuentes-Mitchell* doctrine, would furnish scant guidelines for lawyers over the country on this important question due to the plethora of distinguishing and peculiar characteristics involved in the case and the unique manner in which

the constitutional question has been raised. In short, resolution of this important question should await a more appropriate vehicle.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-369

WEIDINGER CHEVROLET, INC.,
Petitioner,

vs.

UNIVERSAL C.I.T. CREDIT CORPORATION,
Respondent.

PETITIONER'S BRIEF IN REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

In it's Brief in Opposition to Petition for Writ of Certiorari, the Respondent asserts seven additional questions which Respondent says are presented for review. (Resp. brf. pp. 1, 2). All seven additional questions are directed at Petitioner's attack upon the constitutionality of a pre-judgment seizure under the Missouri attachment statutes and the Missouri replevin statutes, including the rules of the Supreme Court of Missouri governing procedures under the said Missouri statutes. Respondent, in the body of it's brief, pages 2 to 13 inclusive, sets forth verbatim, the pertinent Missouri statutes and rules. Since this argument of Respondent is first raised in the Brief in Opposition to Petition for Writ of Certiorari, Petitioner files this reply brief pursuant to the provisions of subsection 4 of Rule 24 of the Rules of this Court.

ARGUMENT

1. Contrary to the assertion of Respondent in it's brief, the record does clearly reflect the factual situation sufficient to support the Motion for Summary Judgment. As part of the agreements contained in Standard Pre-Trial Order Number 2, in paragraph 14 thereof it was agreed:

> "The defendant deprived the plaintiff of the possession of all the aforesaid 22 motor vehicles under Writs of Replevin, Writs of Attachment and Summons to Garnishee against the property and effects of Jimmy Swanson, d/b/a Swanson Chrysler-Plymouth, and plaintiff was not made a party to either the Replevin action or the Attachment action." (Rec. Vol. I, pg. 15)

During the trial of this case in the District Court and in open Court it was stipulated and agreed as follows:

> "Mr. Wood: If the Court please, I believe a short stipulation here that the gentlemen very kindly agree to will avoid our calling the sheriff and the circuit clerk. As I understand, they will stipulate in the record that the 22 automobiles described in the complaint were seized under writ of attachment or a writ of replevin issued in the two pending suits in Maries County against Swanson d/b/a Swanson Chrysler-Plymouth dealer, neither of which action is the plaintiff a party. Is it so stipulated?
>
> Mr. Hearne: Yes, and there is also a writ of replevin—a replevin suit in Phelps County.
>
> Mr. Wood: In Phelps?
>
> Mr. Hearne: Yes.
>
> Mr. Wood: A separate replevin suit?

Mr. Hearne: Yes.

Mr. Wood: And some of these cars——

Mr. Hearne: Were from the Rolla lot.

Mr. Wood: In other words, you are stipulating that these 22 cars were seized under writ of replevin or writ of attachment issued against Swanson in which action the plaintiff was not a party?

Mr. Hearne: That is correct."

(Rec. Vol. I, pp. 113, 114).

We respectfully submit that the foregoing stipulation and agreement in the record clearly shows that the twenty-two (22) automobiles in question were seized under writs of attachment and writs of replevin issued against Swanson and that Petitioner was not a party to either action. As indicated, Respondent has set forth at length the pertinent provision of the Missouri law on replevin and attachment.

2. At the time Petitioner filed its Motion for Summary Judgment, we believed and now believe that the question of retroactivity of the rule announced by this Court in Fuentes v. Shevin, 407 U. S. 67, 32 L. Ed. 2d 556, 92 S. Crt. 1983, had been resolved by this Court in Georges v. McClellan, 409 U. S. 1120 (1973), 93 S. Ct. 935, 35 L. Ed. 2d 253, where this Court affirmed without opinion, the decision of a three Judge District Court in Rhode Island, McClellan v. Commercial Credit, 350 F. Supp. 1013 (D.R.I. 1972) affirmed sub nom. It affirmatively appears in the record in McClellan v. Commercial Credit, supra, that the Fuentes doctrine was applied retroactively in that case. That is what we argued to the District Court in support of our motion for summary judgment. We do not think there is any question of retroactivity of Fuentes doctrine remaining to be resolved by this Court in view of the McClellan case, supra.

The real question is whether or not Fuentes v. Shevin has been completely overruled by this Court in Mitchell v. W. T. Grant Co., — U.S. —, 40 L.Ed.2d 406, 94 S.Ct. . . . Mitchell v. Grant, supra involved sequestration. The case at bar involved pre-judgment seizures under replevin and attachment. The procedure followed in the case at bar does violence to the rule announced in Fuentes v. Shevin, supra. Is Fuentes v. Shevin, supra, to be completely abandoned?

The case of Higley Hill, Inc., et al., plaintiffs v. Alfred C. Knight, et al., defendants, 360 F. Supp. . . . (D. Mass. 1973) (Resp. brf. p. 27), lends no support to the position of Respondent that the case is authority in the case at bar, in that the Fuentes rule is not retroactive or retroactive in this case. In the Higley Hill case, supra, the Court did hold a hearing before the writ was issued. In the case at bar there was a pre-judgment seizure of the automobiles involved. No hearing was ever held. Moreover, the case above indicates this Court, in affirming the decision of the three Judge District Court in Georges v. McClellan, supra, has definitely applied the Fuentes doctrine retroactively.

Contrary to the assertion of the Respondent in his brief on page 21, the constitutionality of the original taking was raised by Petitioner on December 18, 1972. The trial in the District Court was held on July 7 and 8, 1971, and was continued for further evidence until May 24, 1973, so that the constitutionality of the original taking was raised by Petitioner, in its Motion for Summary Judgment and argued by the Petitioner before the final trial date on the issues.

Thus, the constitutionality of the replevin and attachment was raised before the final trial and after the Fuentes opinion was handed down, thus placing the Court on notice that the new pre-judgment replevin and attachment rules were at least suspect and they knew, or should have known that attachment

and replevin made without notice and hearing opportunity were governed by principles spelled out in Fuentes. Higley Hill, Inc., supra.

Respectfully submitted

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CERTIORARI DENIED